NO. 45765-2-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

B & R SALES, INC.

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

Appeal from Superior Court of Thurston County
12-2-01976-0

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Comes now, B & R Sales, Inc., (the "Firm" and Appellant herein), and makes this reply to the Brief of Respondent of the Department of Labor and Industries (the "Department" and Respondent herein).

The Firm has been a retail seller of flooring materials, counter tops, and linoleum in Lacey, Washington, for nearly fifty years. The Firm engages the services of independent contractors to professionally install their products who are engaged because they have equipment, expertise and vehicles necessary for professional installation of the product. The Firm does not have the capability and must rely on professional subcontractors to install the product.

In the simplest terms, the Department seeks to expand the coverage of the Industrial Insurance Act to require the Firm to pay premiums for these independent contractors who, but for the Department's expanding definitions, have never been covered under the Act.

The evidence provided at hearings before the Board of Industrial Insurance Appeals, regardless of the standard of review applied, and the laws do not support any conclusion but that the independent contractors are not "worker" as that term is defined under the Act, and the findings of fact and conclusions of law made below are in error.

II. ARGUMENT

1. The standard of review applied by the superior court is unclear and incorrect.

The Department argues the appropriate statute applicable to this appeal is RCW 51.48.131, not RCW 51.52.115, and further, the appropriate standard for both this Court and the Superior Court is as follows: Review the assessment based on the record before the Board. *Probst v. Dept.of Labor & Indus.*, 155 Wn. App. 908, 915, 230 P.2d 271 (2010); The Board's findings of fact are reviewed for substantial evidence, defined as evidence sufficient to persuade a fair-minded, rational person of the declared premise. *Dep't of Labor & Indus. v. Mitchel*

Bros. Truck Line, Inc., 113 Wn. App. 700, 704, 54 P.3d 711 (2002); and The Board's legal conclusions are reviewed de novo, but an appellate court gives substantial weight to the agency's interpretation when the subject area falls within the agency's area of expertise. *Id.*

The Superior Court judge's letter opinion clearly states his consideration of the matter was based upon RCW 51.52.115. If, as the Department argues, that is not the correct statute and the review de novo ordered therein is inappropriate, then the superior court applied the incorrect standard.

On the other hand, if, as the Department also argues, this Court must look only to the January 28, 2014 judgment to determine the Superior Court judge's standard of review, still the wrong standard is applied because therein he did not consider the Board's legal conclusions de novo, but instead concluded the conclusions of law do not constitute reversible error of law. It is apparent the Superior Court did not "determine the correct law, independently of the agency's

decision, and apply it to the facts as found by the agency and upheld on review by this court. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 330, 646 P.2d 113 (Wash. 1982).

2. The exclusion of certain independent contractors because they are sole proprietors and other business entities is not a new issue.

The Department incorrectly argues the Firm failed to raise the argument that independent contractors, as sole proprietors and other business entities, are excluded from coverage under the Industrial Insurance Act. In fact, this issue was raised by the firm, which is why sections regarding "legal entities" as "Workers" appear as headings in the Board's Proposed Decision and Order, and the Decision and Order. CABR 155, 8-9. The issue was raised by the Firm perhaps in-artfully and apparently without specific briefed reference to RCW 51.12.020, but raised nonetheless.

The Firm raised repeatedly that the entity structure of the independent contractors precluded them from inclusion under the Industrial Insurance Act. Sole proprietors or partners,

corporations and limited liability companies are expressly excluded from mandatory coverage. RCW 51.12.020. Neither are they considered "workers" nor "employees" automatically covered under the statute. *Berry v. Department of Labor & Indus.*, 45 Wash.App. 883, 884-85, 729 P.2d 63 (1986) (holding partner killed in helicopter crash is not "worker" under the Industrial Insurance Act and is not entitled to mandatory coverage); see RCW 51.08.180, 51.08.185. In fact, unless they opt in, any claim submitted will be denied. See *Johnson v. Department of Labor & Indus.*, 33 Wash.2d 399, 404-05, 205 P.2d 896 (1949) (holding partners are excluded from coverage unless they request it in writing prior to the date of injury); See also *Department of Labor and Industries of State of Wash. v. Fankhauser*, 849 P.2d 1209, 121 Wn.2d 304, 309-310 (1993) (holding Fankhauser and Rudolph although excluded as sole proprietors under the last injurious exposure rule were not barred because they had been covered for injuries caused by exposure during prior employment that was not excluded.). So following the Department's argument and the law, the Firm must pay premiums to cover these

independent contractors although any claims submitted thereby for coverage under the Industrial Insurance Act will be summarily denied. The liberal construction of the Act, required by its terms, RCW 51.12.010, only applies to "in favor of persons who come under the Act's terms." *Berry*, 45 Wash.App.at 884. It does not apply to defining who those persons might be covered under the Act. *Id.*

Additionally, the fact remains that a corporation, or other legal entity, although contractually obligated under contract, can only act through its regularly appointed officers and agents. *State v. Tacoma Ry. & Power Co.*, 61 Wash. 507, 512, 112 P. 506 (1911); *Beall v. Pacific Nat. Bank of Seattle*, 55 Wn.2d 210, 212, 347 P.2d 550 (1959); *Frigidaire Sales Corp. v. Union Properties, Inc.*, 88 Wn.2d 400, 406, 562 P.2d 244 (1977). Similarly a limited liability company can act only through its agents or members. *Columbia Community Bank v. Newman Park, LLC*, 166 Wn.App. 634, 646, 271 P.3d 300 (Wash.App. Div. 2, 2012); *Marina Condo. Homeowner's Ass'n v. Stratford at the Marina, LLC*, 161 Wash.App. 249, 263, 254 P.3d 827 (Wash.App. Div. 1, 2011). Where the independent contractor of

necessity or choice employs others to do all or part of the work he has contracted to perform, then the essence of the contract is not personal labor. *White v. Department of Labor and Indus.*, 48 Wash.2d 470, 474, 294 P.2d 650 (1956). When the contract to be performed contemplates a "specific type of labor, not a specific laborer", then personal labor is not the essence of the contract. *Silliman v. Argus Services Inc.*, 105 Wn.App. 232, 238, 19 P.3d 428 (Wash. App. Div. 3 2001); review denied 144 Wn.2d 1005, 29 P.3d 717 (2001). "'Personal labor' means labor personal to the independent contractor." *Id.* Therefore, even if RCW 51.12.020 is not considered, those independent contractors who are legal entities must of necessity "employ others to do all or part of the work they have contracted to perform" and so "personal labor" cannot be the essence of any contract with such an entity.

3. **Even if the exclusion of certain independent contractors pursuant to RCW 51.12.020 is a new issue, this Court may consider it because failure to consider the statute is a matter of such a character as to render the judgment of the lower tribunal void.**

Exceptions exist to the ordinary rule that errors not raised below will not be considered on appeal when the matter first raised on appeal is of such a character as to render the judgment of the lower court void, the record discloses a combination of gross irregularities, this matter first raised on appeal elates to the foundation of the rights of the parties, as where the effect of the application of the rule would be to make the rights of the parties depend upon a statute which the court is judicially bound to know does not govern the case, or the issue is necessary to serve the ends of substantial justice or prevent the denial of fundamental rights. *Maynard Investment Co., Inc. v. McCann*, 77 Wn. 2d 616, 621-622, 465 P.2d 657, (1970). "Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statue or an established precedent." *Id* at 623. Both parties failed to recognize the existence of a relevant statute. *Id* at 621. Only at hearing before the Supreme Court, after the issue was raised sua sponte by the court, was the existence of the relevant

statute revealed. *Id.* The statute was not raised at trial. *Id.* Similarly, in this case a relevant statute, RCW 51.12.020 was not considered at trial. Similarly, this overlooked statute fundamentally changed the character of the case. In that case RCW 9.54.080 caused certain defendants to be considered as bailee, with no rights to convert certain funds and reversed a dismissal based upon those defendants' apparent contractual authority to convert the funds. *Id.* In this case, the overlooked statute means those independent contractors are excluded from the Industrial Insurance Act, unless they opt into the system under RCW 51.12.110 and 51.32.030. By ignoring this exclusion, the Department's Notice of Order and Assessment at issue deny these independent contractors their right to choose whether or not to be included under the Industrial Insurance Act, even though those independent contractors are not even parties to this action. As in Maynard, even if this is a new issue, it is of the type of issue which ought be considered by this court on appeal because the failure to consider RCW 51.12.020 is of

such a character as to render the judgment of the lower court void.

4. **The Department argues only "unique devices that are not available to the general public" would satisfy to show the machinery or equipment were distinguishable from "the usual hand tools" and so personal labor was not the essence of the contract. *White v. Dep't of Labor & Industries*, 48 Wn.2d 470, 294 P.2d 650 (1956).**

The essence of a contract is not personal labor when the independent contractor "must of necessity own or supply machinery or equipment (as distinguished from the usual hand tools) to perform the contract" *White v. Department of Labor and Indus.*, 48 Wash.2d 470, 474, 294 P.2d 650 (1956). *Lloyd's of Yakima Floor Center v. Department of Labor & Industries,* 33 Wn.App. 745, 662 P.2d 391 (1982) quotes from *White* at 749 and 751, but the Department chooses to quote where *Lloyd's* misquotes *White* and holds "the installers did furnish tools consisting of the usual tools of the trade." The Department argues even further that only "unique devices that are not available to the general public" would satisfy to show the

machinery or equipment required under contract are distinguishable from "the usual hand tools." Responding Brief page 25. The Department argues "the fact that they may be specialized tools for a particular industry does not matter, after all, it is the tools of the given "trade" that are looked at." *Id.* Under such an expansion of the *White* test, Ms. White herself would not pass the *White* test because the "donkey engine", is neither unique nor unavailable to the general public and is specifically the required "tool of the trade" to "yard out and cold deck the logs." *White* at 475.

All of the evidence supports the Firm contracted with subcontractors because of their expertise, equipment and vehicles. If an independent contractor did not have the equipment or vehicle necessary to complete the job, the Firm would not contract with them. Each of the subcontractors had specialties: carpet, vinyl, tile, laminate, ceramic windows and countertops, and these specialties required specialized tools. These were clearly not ordinary hand tools, and they were

clearly a necessity to perform the contract. Therefore, the essence of the contracts herein is not "personal labor" and the subcontractors are not "workers."

In addition to the machinery and equipment requirements, the subcontractors were contractually obligated to provide more than labor, in ways that no employee could have been required. The independent contractors were obligated to provide: insurance, well above the bond of contractors; a guarantee of their work; indemnification and to hold the Firm harmless against any and all claims, and further to tender costs of attorney's fees to the Firm. Satisfaction of these contract terms were necessary to perform their contract, and so, show that the contracts in this case were for more than mere personal labor. It is true that labor was necessary to perform these contracts, as in *Lloyds*. It is also true the primary purpose of the contracts was to complete a job. However, in every contract that some personal labor is required, and every contractor is primarily contracted to complete a job. If we accept the finding

below is supported by substantial evidence according to law, then the essence of every contract is personal labor. If we accept the Department's arguments regarding "equipment and machinery" then no contract could pass the first prong of the *White* test.

In this case substantial evidence does not support the findings of the Board or the Superior Court that the subcontractors here are covered workers. In fact, the subcontractors, like the Whites, are independent contractors not covered by the Industrial Insurance Act.

III. CONCLUSION

Based on the foregoing, the Appellant requests the Court to reverse the Board's August 29, 2012 Decision and Order and the Superior Court's decision affirming that decision, vacate the Department's assessment and to remand this matter back to the Board for any further proceedings including the refund of monies paid by the Firm plus pre-judgment, interest, court costs and applicable attorney's fees per RCW 51.52.112; 4.84.340 -

.360; and RAP 14.3 and 18.1.

DATED this 3rd day of July, 2014.

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By: _____

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CERTIFICATE OF SERVICE

I, Donna Perkins, hereby certify under penalty of perjury under the laws of the State of Washington that on July 3, 2014, I filed with the Court of Appeals Division II, via ABC Legal Messenger the original and one copy of the following document:

1. **APPELLANT'S REPLY BRIEF**

and that I further served a copy via Facsimile and U.S. mail, postage pre-paid, upon:

Ms. Katy Dixon
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SIGNED in Lacey, Washington on July 3, 2014.

Donna Perkins
DONNA PERKINS